85-579

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No. 85-_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

WALTER WARREN,

Petitioner,

v.

LOCAL 1759, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

GLENN M. TAUBMAN
National Right to Work Legal
Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, Virginia 22160
(703) 321-8510

Counsel of Record for Petitioner

October 3, 1985

QUESTION PRESENTED

Does a federal court have subject-matter jurisdiction to adjudicate a duty of fair representation lawsuit brought by a civilian federal employee against his union; or is the employee relegated to using only the processes of the Federal Labor Relations Authority to attempt to redress the union's violation of its duty of fair representation?

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No. 85-_____

IN THE

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OCTOBER TERM, 1985

WALTER A. WARREN,

Petitioner,

v.

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1759,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner Walter A. Warren prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit in the above-entitled case.

REPORT OF THE OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 764 F.2d 1395 (11th Cir. 1985) and is reproduced as Appendix A to this petition. The unreported decision of the United States Dis-

trict Court for the Northern District of Georgia is reproduced as Appendix B to this petition.

JURISDICTION

The decision of the court of appeals was entered on July 5, 1985. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1). This petition is filed within ninety (90) days after the entry of the decision of the court of appeals, pursuant to 28 U.S.C. § 2101(c) and Rule 20.2, Rules of the United States Supreme Court.

STATUTORY PROVISIONS INVOLVED

This case involves the general federal question jurisdiction statute, 28 U.S.C. § 1331, and Title VII of the Civil Service Reform Act (Federal Service Labor-Management and Employee Relations Statute), 5 U.S.C. § 7101 *et seq.* The relevant statutes are reprinted in Appendix C, *infra.*

STATEMENT OF THE CASE

The issue in this case is whether a civilian federal employee may invoke the general federal question jurisdiction of a federal court to litigate a duty of fair representation claim against his exclusive bargaining representative.

Petitioner Walter Warren is a civilian employed by the United States Department of the Army at Fort McPherson, Georgia. Local 1759, American Federation of Government Employees, has been certified as the exclusive bargaining representative of a unit of civilian federal employees, including petitioner. Petitioner is not a

member of Local 1759 and has never paid dues to the union.

In April 1983 the Department of the Army suspended petitioner without pay for five days based upon allegations of misconduct. Petitioner disagreed with the discipline and invoked the contractual grievance procedures which had been negotiated by Local 1759 and his employer. After exhausting the initial grievance procedures, petitioner asked Local 1759 to take his grievance to arbitration, but the union refused.

On June 3, 1983, petitioner filed an unfair labor practice charge with the Federal Labor Relations Authority (FLRA) against the union. He charged, in essence, that the union had failed to take his grievance regarding the five-day suspension to arbitration solely because of his nonmembership in the union. The FLRA regional director refused to issue a complaint on this unfair labor practice charge. Petitioner then appealed to the FLRA General Counsel, who affirmed the regional director's decision.

In May 1983 the Department of the Army issued a second suspension against petitioner, this time withholding his pay for ten days. Petitioner again went through the grievance procedures and again asked Local 1759 to take his grievance to arbitration. Again, Local 1759 refused.

On August 31, 1983, petitioner filed a second FLRA unfair labor practice charge against Local 1759. This unfair labor practice charge alleged that the union was again discriminating against petitioner because of his nonmembership in the union. Additionally, petitioner

charged that the union was retaliating against him for having filed his prior unfair labor practice charge.

The FLRA regional director again refused to issue a complaint on this second unfair labor practice charge. Petitioner again appealed to the FLRA General Counsel, who again affirmed the decision of the regional director and denied the appeal.

On September 30, 1983, petitioner initiated this litigation by filing a *pro se* complaint in the United States District Court for the Northern District of Georgia. The complaint alleged that Local 1759 had breached its duty of fair representation by capriciously and hostilely refusing to take petitioner's grievances to arbitration, based upon his nonmembership in the union. Federal court jurisdiction was predicated upon 28 U.S.C. § 1331, the general federal question jurisdiction statute.

Local 1759 filed a motion to dismiss the complaint, primarily arguing that the district court lacked subject-matter jurisdiction over a federal employee's duty of fair representation lawsuit. The district court agreed and dismissed petitioner's complaint. Specifically, the district court held that it had no subject-matter jurisdiction because the Federal Labor Relations Authority had exclusive jurisdiction over complaints by civilian federal employees alleging breach of the duty of fair representation.

The U.S. Court of Appeals for the Eleventh Circuit affirmed the decision of the district court, holding that federal court jurisdiction to adjudicate petitioner's fair representation claim does not exist. This petition for a writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

I. The Eleventh Circuit's Decision Is An Unwarranted Limitation On The General Federal Question Jurisdiction Of The Federal Courts To Decide Duty Of Fair Representation Claims, Where Congress Has In No Way Manifested An Intention To Limit That Jurisdiction

This case raises an important question never before addressed by this Court, to wit: whether a federal court has jurisdiction to adjudicate a duty of fair representation lawsuit brought by a civilian federal employee against his union; or whether the employee is relegated to using only the processes of the Federal Labor Relations Authority to redress his injury. In enacting Title VII of the Civil Service Reform Act, Congress did not expressly limit the federal courts' subject-matter jurisdiction over federal employees' fair representation lawsuits. In fact, Congress remained silent on this issue, so the judiciary has been left to glean congressional intent from the statutes.

In 1978, Title VII of the Civil Service Reform Act, Pub. L. 95-454, 92 Stat. 1192, known as the Federal Service Labor-Management and Employee Relations Statute (5 U.S.C. § 7101 *et seq.*) was enacted. The purpose of the Civil Service Reform Act was to create "a comprehensive revision of the laws governing the rights and obligations of civil servants." *Cornelius v. Nutt*, ____ U.S.____, 105 S. Ct. 2882 (1985).

In enacting Title VII of the Civil Service Reform Act, however, Congress did not write on a clean slate. Title VII is closely patterned after the administrative scheme enacted under the Labor Management Relations Act (LMRA), 29 U.S.C. § 141 *et seq.* For instance, Title VII establishes the Federal Labor Relations Authority, like the National Labor Relations Board, for the purpose of investigating unfair labor practices. Title VII also grants unions representing federal employees the power of "exclusive representation," much as unions representing private employees have under the LMRA.[1] Finally, Title VII makes it an unfair labor practice for a federal employee union to discriminate against a bargaining unit member.

Nothing in Title VII of the Civil Service Reform Act, however, expressly limits the *methods* through which an aggrieved federal employee may seek redress against a union which has breached its duty of fair representation. Nothing in the Act expressly states that the processes of the FLRA are the exclusive remedy for an employee who alleges that the union is discriminating against him. The court of appeals held, however, that Congress intended to preempt the federal courts from exercising their general federal question jurisdiction when it enacted Title VII of the Civil Service Reform Act. That holding is supported neither by the text of the Civil Service Reform Act nor by this Court's duty of fair representation precedents.

At the time that Congress enacted Title VII of the Civil Service Reform Act and patterned it after the LMRA, the judicially enforced duty of fair representa-

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[1] *Compare* 5 U.S.C. § 7111(a) *with* 29 U.S.C. § 159(a).

tion had been long established by this Court, under both the LMRA and the Railway Labor Act. *Vaca v. Sipes*, 386 U.S. 171 (1967); *Steele v. Louisville and Nashville Railroad Co.*, 323 U.S. 192 (1944). More importantly, this Court had specifically held that federal courts have subject-matter jurisdiction over fair representation claims because they "arise under" federal law. *Tunstall v. Brotherhood of Locomotive Firemen and Enginemen*, 323 U.S. 210 (1944).[2] Congress clearly knew of these precedents but said nothing explicit in Title VII of the Civil Service Reform Act that would either limit the federal courts' jurisdiction over these claims or make the FLRA's unfair labor practice procedures an aggrieved employee's exclusive remedy.[3]

In *Vaca v. Sipes*, *supra*, this Court recognized that a congressional grant of exclusive representation authority to a union, like the one given to respondent herein, might be unconstitutional unless there were checks and restraints on the union's power. Thus, *Vaca v. Sipes*, *supra*, allowed federal courts to exercise "supervisory" jurisdiction over unions through employees' fair representation damage suits, even though similar complaints could also be brought to the NLRB.

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[2] The federal law under which fair representation claims "arise" is the statutory grant of exclusive representation powers to unions. *See Vaca v. Sipes, supra.*

[3] In its most recent decisions construing the analogous provisions of the LMRA, this Court appears to have approved of a "two-track" system whereby employees with a fair representation claim may choose between filing an administrative complaint with the NLRB or initiating federal court litigation. *U.P.S. v. Mitchell*, 451 U.S. 56, 67 n.3 (1981); *Del Costello v. IBT*, ___ U.S. ___, 103 S. Ct. 2281, 2293 (1983); *see also Miranda Fuel Co.*, 140 NLRB 181 (1962).

> Since [*Steele v. Louisville and Nashville Railroad Co.*] the duty of fair representation has stood as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law. Were we to hold, as petitioners and the Government urge, that the courts are foreclosed . . . from this traditional supervisory jurisdiction, the individual employee injured by arbitrary or discriminatory union conduct could no longer be assured of impartial review of his complaint, since the Board's General Counsel has unreviewable discretion to refuse to institute an unfair labor practice complaint . . . . The existence of even a small group of cases in which the Board would be unwilling or unable to remedy a union's breach of duty would frustrate the basic purposes underlying the duty of fair representation doctrine.

Vaca v. Sipes, 386 U.S. at 182-83 (citations omitted).

This Court's reasoning in *Vaca v. Sipes*, *supra*, is equally applicable to fair representation claims pressed by federal employees. Indeed, petitioner twice took his fair representation claim to the FLRA, and was twice denied the adversarial hearing which he sought. His complaint remains unredressed. Nothing in Title VII of the Civil Service Reform Act indicates that Congress meant to sanction such a result.

The Eleventh Circuit's decision failed to properly consider the traditional role of the federal courts in duty of fair representation cases. Its analysis ignored this Court's decision in *Vaca v. Sipes*, *supra*, which established the important policy reasons for giving an aggrieved employee quick access to the federal courts to litigate a duty of fair representation claim. Congress could have overrid-

den these policy considerations and made the FLRA processes the exclusive remedy for aggrieved federal employees. However, there is no clear evidence in the Act to show that Congress intended to do that. Thus, the lower court's decision constitutes a misreading of congressional intent and is an unwarranted limitation of the general federal question jurisdiction of the courts.

II. A Decision By This Court Is Necessary To Settle An Important Question Of Law Affecting Many Thousands Of Civilian Federal Employees, On Which Federal Courts Have Issued Conflicting Opinions

The few federal courts that have faced the instant jurisdictional issue have rendered conflicting opinions. In *Karahalios v. Defense Language Institute*, 534 F. Supp. 1202 (N.D. Cal. 1982) and *Karahalios v. Defense Language Institute*, 544 F. Supp. 77 (N.D. Cal. 1982), a federal district court held that it had subject-matter jurisdiction under 28 U.S.C. § 1331 to adjudicate a duty of fair representation claim brought by a civilian federal employee against his union. Following this Court's decisions in *Steele v. Louisville and Nashville Railroad Co.*, *supra*, and *Vaca v. Sipes*, *supra*, the *Karahalios* cases held that since a union's duty of fair representation "arises under" federal law, the courts have general federal question jurisdiction over these claims.

In rejecting petitioner's appeal, however, the Eleventh Circuit specifically rejected the decision of the U.S. District Court for the Northern District of California in

Karahalios. After noting that the *Karahalios* cases "supported [petitioner Warren's] position," the court of appeals held that the *Karahalios* decisions rested upon "faulty premises."[4]

The obvious conflict in the decisional law of the lower courts should be addressed by this Court. Many thousands of civilian federal employees are affected by the continuing uncertainty which these conflicting decisions have created. Furthermore, the FLRA administrative processes are also subject to confusion while this issue remains unresolved.[5]

CONCLUSION

The decision of the court of appeals is an unwarranted limitation upon the general federal question jurisdiction of the federal courts. Congress did not intend to exclude federal employees from the judiciary's traditional supervisory jurisdiction over duty of fair representation litigation when it enacted Title VII of the Civil Service

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[4] At least one other federal district court, having addressed the identical issue, has held that federal courts have no subject-matter jurisdiction to adjudicate a federal employee's duty of fair representation complaint against his union. ***Butler v. AFGE***, Civil Action No. C81-482 (N.D. Ohio 1982) (unreported memorandum decision). Similarly, one other U.S. Court of Appeals has addressed this issue and apparently held that federal courts have no subject-matter jurisdiction in this type of case. *Wilson v. United States Bureau of Prisons*, Case No. 84-5735 (3d Cir. 1985) (unreported memorandum decision), *affirming* Case No. 83-0805 (M.D. Pa. 1984) (unreported memorandum order).

[5] Because of the important public policy questions underlining this case, and the impact which a decision will have upon all civilian federal employees and the FLRA, petitioner respectfully believes that it would be appropriate for this Court to request that the Solicitor General of the United States express the position of the United States with regard to the instant petition for certiorari.

Reform Act. Finally, the conflicting decisions issued by lower federal courts have created confusion among the bench and bar. This Court should settle the interesting and important jurisdictional issue presented by this case.

Respectfully submitted,

Glenn M. Taubman
National Right to Work Legal
Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, Virginia 22160
(703) 321-8510

Counsel of Record for Petitioner

APPENDICES

APPENDIX A

Decision of the
United States Court of Appeals
for the Eleventh Circuit

July 5, 1985

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

WALTER A. WARREN,
Plaintiff-Appellant,

v.

LOCAL 1759, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,
Defendant-Appellee.

No. 84-8377
July 5, 1985

Appeal from the United States District Court for the Northern District of Georgia.

Before KRAVITCH and CLARK, Circuit Judges, and PECK*, Senior Circuit Judge.

JOHN W. PECK, Senior Circuit Judge:

This case is before the court upon an appeal from the district court order granting the appellee's motion to dismiss for lack of subject matter jurisdiction. Appellant Walter Warren is a civilian employed by the Department of the Army at Fort McPherson, Georgia. Local 1759, American Federation of Government Employees, is the exclusive collective bargaining representative of a unit of civilian federal employees including Warren.

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* Honorable John W. Peck, U.S. Circuit Judge for the Sixth Circuit, sitting by designation.

In April 1983, Warren was suspended without pay for five days based upon allegations of misconduct. He disagreed with the disciplinary action and invoked the contractual grievance procedures which had been negotiated by Local 1759 and his employer. After exhausting the initial grievance procedures, he asked Local 1759 to take his grievance to arbitration, but the union refused. Warren then filed an unfair labor practice charge with the Federal Labor Relations Authority ("FLRA") against the union. The FLRA Regional Director refused to issue a complaint, stating that the charge had been investigated and it did not appear that further proceedings were warranted. Appellant then appealed to the FLRA General Counsel, who affirmed the Regional Director's refusal to issue a complaint. In May 1983, Warren was again suspended; once more he went through the procedure outlined above. As before, the FLRA Regional Director refused to issue a complaint and the decision was affirmed by the FLRA General Counsel.

Warren then initiated this litigation by filing a complaint in the United States District Court for the Northern District of Georgia, alleging that Local 1759 had breached its duty of fair representation by capriciously and with hostility refusing to take his grievances to arbitration because he was not a member of Local 1759. Federal court jurisdiction was predicated upon 28 U.S.C. § 1331. The district court dismissed Warren's complaint, holding that the court lacked subject matter jurisdiction because the FLRA had exclusive jurisdiction over the controversy. For the reasons set forth below, we affirm.

The sole issue before this court is whether, under Title

VII of the Civil Service Reform Act (the Labor-Management and Employment Relation statute), 5 U.S.C. § 7101 *et seq.*, a federal employee can invoke the jurisdiction of the federal district courts to adjudicate a duty of fair representation action against the employee's exclusive bargaining representative. Title VII of the Civil Service Reform Act ("CSRA") explicitly governs labor-management relations in the federal sector. Section 7114(a)(1) imposes a duty of fair representation upon a labor organization which is the exclusive representative of the federal employees in its unit: "An exclusive representative is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership." In the present case, Warren contends that Local 1759 breached its § 7114(a)(1) duty of fair representation by failing to proceed to arbitration. Section 7116 sets forth actions which constitute unfair labor practices for purposes of the CSRA. As the district court noted, the breach alleged by Warren would constitute an unfair labor practice under § 7116(b).[1]

In § 7105 of the CSRA, Congress gives the FLRA the powers and duties to take necessary and appropriate actions to effectively administer the provisions of the CSRA. Section 7105 confers upon the FLRA the authority to conduct hearings and resolve complaints of unfair labor practices. Section 7118 requires the General Coun-

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[1] 5 U.S.C. § 7116(b) provides in relevant part:

For the purpose of this chapter, it shall be an unfair labor practice for a labor organization—

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

. . . .

(8) to otherwise fail or refuse to comply with any provision of this chapter.

sel of the FLRA to investigate charges of unfair labor practices and to either issue a complaint or provide the charging party with a written statement of the reasons for not issuing a complaint. The district court, quoting from *National Federation of Federal Employees, Local 1263 v. Commandant, Defense Language Institute*, 493 F.Supp. 675, 679 (N.D.Cal.1980) ("NFFE"), noted that under the CSRA Congress explicitly empowers the federal courts to act in three instances:

> First, it makes judicial review of final orders of the FLRA available only in the appropriate federal circuit court of appeals. 5 U.S.C. § 7123(a). Second, it provides that the FLRA may petition a circuit court of appeals for enforcement of its orders and for appropriate temporary relief of restraining order. 5 U.S.C. § 7123(b). Third, pursuant to § 7123(d), the FLRA, upon issuing an unfair labor practice complaint, may petition a federal district court for temporary injunctive relief. 5 U.S.C. § 7123(d).

The district court concluded that reading the CSRA as a whole shows that Congress intended for the statutory procedure to be deemed exclusive. Appellant, however, argues that federal courts have subject matter jurisdiction to hear duty of fair representation lawsuits brought by federal employees. Appellant states that prior to the enactment of the CSRA in 1978, under both the National Labor Relations Act ("NLRA") and the Railway Labor Act, employees have used the "general federal question jurisdiction" of 28 U.S.C. § 1331 to litigate duty of fair representation claims against their unions in federal courts. He contends that nothing in the CSRA, either explicitly or implicitly, evinces a Congressional intent to abrogate the federal employees' right to litigate

duty of fair representation claims in federal courts.

Thus, our analysis first focuses upon the question of Congressional intent. Because Congress patterned the FLRA on the National Labor Relations Board ("NLRB") in many respects,[2] a review of judicial precedents of private sector law which had arisen under the NLRA is in order.

In the instant case, the district court found significant the fact that although Congress patterned the FLRA in many respects after the NLRB, Congress did not enact a provision in the CSRA that parallels § 301[3] of the LMRA. Section 301 provides in pertinent part:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties.
>
> . . .

Thus, § 301 confers jurisdiction of the district court over suits based upon collective bargaining agreements in the private sector. The district court stated:

> In that Congress did not enact in the FLRA a provision analogous to Section 301 of the LMRA and because Congress explicitly empowers the federal

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[2] *See Columbia Power Trades Council v. U.S. Department of Energy*, 671 F.2d 325 (9th Cir.1982); *National Federation of Federal Employees Local 1263 v. Commandant, Defense Language Institute*, 493 F.Supp. 675 (N.D.Cal.1980).

[3] Section 301, 29 U.S.C. § 185(a), was enacted in 1947 as part of the Labor Management Relations Act, 61 Stat. 156, which amended the NLRA.

> courts to act in three situations applicable to this case, the Court declines to carve out an exception to the preemption doctrine as urged by the plaintiff.

In *Yates v. United States Soldiers' and Airmens' Home*, 533 F.Supp. 461 (D.D.C.1982), the court analyzed the legislative history of the CSRA and discussed the significance of the absence of a § 301 analogue:

> The failure of Congress to provide a clear jurisdictional grant to district courts over disputes involving public sector labor agreements is particularly telling when compared with the approach taken by Congress in the private sector . . . .
>
> The Civil Service Reform Act of 1978 contains no provision analogous to § 301. Not only is the Act silent on the point, but the legislative record indicates that Congress did, in fact, consider and reject a proposed provision similar to § 301 when it enacted the Act. [NFFE, *supra.*], 493 F.Supp. 675, 681 n. 13 (N.D.Cal.1980).

533 F.Supp. at 464-5.

The court concluded "that the absence of a jurisdictional grant in the Act is a clear indication that Congress intended to bar actions to enforce collective bargaining agreements in the district courts." 533 F.Supp. at 463.

Similarly, in *Columbia Power Trades Council v. U.S. Department of Energy*, 671 F.2d 325 (9th Cir.1982), the court reached the same conclusion:

> The only provision made for judicial jurisdiction appears in 5 U.S.C. § 7123. An aggrieved party may appeal the Authority's action to a court of appeals,

> the Authority may petition a court of appeals for enforcement of its orders, and the Authority may seek an injunction in a district court after it has issued a complaint. At no point does the Act entitle a party to petition a district court for relief. Given the broad purpose of the Act to meet the special requirements of government, the leadership role of the Authority, and the limited role of the judiciary in this statutory scheme, it is manifestly the express desire of Congress to create an exclusive statutory scheme. (footnotes omitted)

533 F.Supp. at 463.

Appellant argues that Congress' failure to enact a § 301 analogue in the CSRA is irrelevant because the separate jurisdictional grant in § 301 has never served as the jurisdictional basis of a duty of fair representation claim. He cites the seminal case of *Vaca v. Sipes*, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967), in which an employee with medical problems was discharged from a job requiring heavy work. The union took the grievance through the initial steps of the grievance procedure, but refused to proceed to arbitration. The employee then brought an action against union officials in state court. Before the Supreme Court, defendants made the argument, *inter alia*, that the state court lacked subject matter jurisdiction because the union's conduct was an unfair labor practice, and thus the action was within the exclusive jurisdiction of the NLRB. The Court held that the state court had jurisdiction over the action, citing "the unique role played by the duty of fair representation doctrine in the scheme of federal labor laws, and its important relationship to the judicial enforcement of collective bargaining agreements in the context presented

here." 386 U.S. at 188, 87 S.Ct. at 916. Appellant maintains that under *Vaca*, the Supreme Court implicitly approved of a dual system in which employees can file unfair labor practice charges against the union with the NLRB, or they can sue for damages in federal court, independent of the NLRB's procedures. Appellant contends that Congress was aware of this dual system when it enacted the CSRA in 1978, and did not expressly reject it.

Appellant states that at the time Congress enacted the CSRA, federal courts had held that subject matter jurisdiction over private sector duty of fair representation claims is properly predicated upon 28 U.S.C. § 1337.[4] *Smith v. Local 25, Sheet Metal Workers*, 500 F.2d 741, 748 (5th Cir.1974); *Mumford v. Glover*, 503 F.2d 878, 882-83 (5th Cir.1974). Both *Smith* and *Mumford*, however, are distinguishable from the present case. *Mumford* involved a claim that the union had breached its duty in the administration of a pension plan; there was no underlying employer action in violation of a collective bargaining agreement. Similarly, *Smith* did not involve an allegation of an underlying violation of a collective bargaining agreement. In both *Mumford* and *Smith*, the court found jurisdiction under 28 U.S.C. § 1337 because the NLRA and the Railway Labor Act, respectively, were laws regulating commerce. Because no violation of

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[4] 28 U.S.C. § 1337 states:

> The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.

Because Appellant alleges jurisdiction under 28 U.S.C. § 1331, we do not reach the issue of whether the CSRA is an act regulating commerce within the meaning of § 1337.

a collective bargaining agreement was involved, there could be no § 301 jurisdiction. The court in *In re Carter*, 618 F.2d 1093, 1104 (5th Cir.1980), summarizes this point succinctly:

> When the allegations assert a breach of the duty of fair representation without a corresponding breach of the collective contract, federal question jurisdiction cannot be grounded on Section 301.

Regardless of Appellant's failure to name the employer as a party to this action, there is an underlying allegation that the breach of the duty of fair representation involved a breach of the collective bargaining agreement by the employer. Appellant's complaint stated: "Local 1759 has entered into a collective bargaining agreement with plaintiff's employer as a result of its exclusive representation of the bargaining unit" and "Local 1759 owes plaintiff a statutory duty to fairly represent plaintiff in all aspects of its administration of the collective bargaining agreement, pursuant to § 7114(a)(1)." If Appellant's action had been in the private sector, § 301 would have been the jurisdictional basis because the action involved both the duty of fair representation and breach of collective bargaining agreement claims. *Carter, supra; see also Seymour v. Olin Corp.*, 666 F.2d 202 (5th Cir.1982). Because Congress considered and rejected a § 301 parallel in the CSRA, we conclude that Congress did not intend for federal courts to have jurisdiction over such duty of fair representation claims by federal employees.

The cases of *Karahalios v. Defense Language Institute*, 534 F.Supp. 1202 (N.D.Cal.1982) and *Karahalios v. Defense Language Institute*, 544 F.Supp. 77 (N.D.Cal. 1982) (*Karahalios II*) support Appellant's position. In

those cases, the plaintiff, a federal employee, brought action against the federal employer and the union, alleging unfair representation, breach of the collective bargaining agreement, and due process and equal protection violations. The district court held that it had subject matter jurisdiction of the employee's claim against the union for breach of the duty of fair representation under 28 U.S.C. § 1331. *Karahalios* at 1206-7; *Karahalios II* at 79.

Appellee argues that the court in the Karahalios cases relied on two faulty premises: first, the alleged lack of an explicit duty of fair representation provision in the CSRA and second, the inability of the FLRA to provide individual relief to employees aggrieved by a breach of the duty of fair representation. Appellee is correct in its assertion that the court in *Karahalios* erroneously assertion that the court in *Karahalios* erroneously stated that there is not an explicit duty of fair representation provision in the CSRA; actually, the CSRA provides for an explicit duty of fair representation by a union to federal employees which it exclusively represents in § 7114(a).[5] In contrast, neither the NLRA nor the Railway Labor Act explicitly impose a duty of fair representation; an implied duty, however has been established through court and NLRB decisions. *See Vaca, supra; Steele v.*

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[5] Appellant maintains that unions have both an implied and an express duty of fair representation under the CSRA. He contends that the judicially enforceable duty of fair representation arises out of 5 U.S.C. § 7111 (Congress' grant of exclusive representation) and *not* out of the explicit provision of 5 U.S.C. § 7114(a)(1). We do not agree with Appellant's contention that the duties enumerated in § 7114(a)(1) are "irrelevant" here. Rather, we agree with Appellee that the failure of the court in *Karahalios* to recognize the explicit duty of fair representation undermines the validity of the conclusion reached in that decision.

Louisville and Nashville Railroad, 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173 (1944); *Tunstall v. Brotherhood of Locomotive Firemen and Enginemen*, 323 U.S. 210, 65 S.Ct. 235, 89 L.Ed. 187 (1944); *Miranda Fuel Co.*, 140 NLRB 181, 51 LRRM 1584 (1962). Appellee also correctly asserts that the concern expressed by the court in *Karahalios* that the FLRA would be unable to provide relief to federal employees aggrieved by a breach of the duty of fair representation is unwarranted. Section 7118(a)(7) provides that upon finding an unfair labor practice, the FLRA shall issue an order requiring reinstatement of back pay or such other relief as will effectuate the purpose of the statute.[6]

Based upon the foregoing analysis, we hold that Congress conferred exclusive jurisdiction over a federal employee's duty of fair representation claim in the FLRA. Accordingly, the decision of the district dismissing Appellant's complaint is AFFIRMED.

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[6] Appellant cites *Broida, Fair Representation for Federal Employees: An Overview*, Federal Bar News and Journal, Vol. 30/No. 11, page 440, 442 (Nov.1983), in which it is stated that the FLRA enforces duty of fair representation claims "less vigorously than its private sector counterpart." In view of the numerous FLRA cases, cited in Appellee's brief, in which relief was granted against the union for breach of the duty of fair representation, we are unpersuaded by Appellant's argument that the FLRA lacks zeal in prosecution of duty of fair representation claims.

APPENDIX B

Order of the United States District Court for the Northern District of Georgia

March 26, 1984

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

WALTER A. WARREN	
v.	C83-2118A
LOCAL 1759, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES	Filed: March 26, 1984

ORDER

The plaintiff, Walter A. Warren, in the above-styled civil action filed a complaint against the American Federation of Government Employees ["AFGE"] Local 1759 for an alleged failure to fairly represent him by refusing to proceed to arbitration with respect to two separate suspensions imposed upon him by his employer, the United States Department of the Army. Defendant AFGE, in response, filed the pending motion to dismiss which is now ripe for ruling. The determinative issue before the Court is whether under the Federal Labor-Management Relations statute, Title VII of the Civil Service Reform Act of 1978, 5 U.S.C. § 7101 *et seq.* ["FLRS"], a private party, namely a federal employee, can invoke the limited jurisdiction of a federal district court to determine if the exclusive union representative breached its duty of fair representation in its handling of the employee's grievance. Upon consideration of the briefs, the FLRS and the applicable case law, the Court concludes that it lacks

subject matter jurisdiction over this action because the Federal Labor Relations Authority has exclusive jurisdiction over the instant controversy. As a result, the defendant's motion to dismiss is granted.

The Fair [*sic*] Labor-Management Relations statute explicitly governs labor management relations in the federal sector. Section 7114(a)(1) provides that a labor organization that is the exclusive representative of the federal employees in its unit is responsible for representing the interests of those employees without discrimination and without regard to labor organization membership. The plaintiff contends that the defendant breached its section 7114(a)(1) duty by failing to proceed to arbitration with respect to his suspensions allegedly because the plaintiff was not a member of the union. Complaint ¶¶ 4-12. However, these allegations are, in effect, charges of unfair labor practice under 5 U.S.C. § 7116(b), which provides in pertinent part:

> For the purposes of this chapter, it shall be an unfair labor practice for a labor organization—
>
> . . .
>
> (5) to refuse to consult or negotiate in good faith with an agency as required by this chapter,
>
> . . .
>
> (8) to otherwise fail or refuse to comply with any provision of this chapter.

Under 5 U.S.C. § 7105, Congress gives the Federal Labor Relations Authority ["FLRA"] jurisdiction over actions by private parties seeking relief from unfair labor practices:

> (2) The authority shall to the extent provided in this chapter and in accordance with regulations prescribed by the [FLRA]—
>
> . . .
>
> (G) conduct hearings and resolve complaints of unfair labor practices under section 7118 of this title.

Title 5 U.S.C. § 7118(a)(1) provides as follows:

> If any agency or labor organization is charged by any person with having engaged in or engaging in an unfair labor practice, the General Counsel shall investigate the charge and may issue and cause to be served upon the agency or labor organization a complaint. In any case in which the General Counsel does not issue a complaint because the charge fails to state an unfair labor practice, the General Counsel shall provide the person making the charge a written statement of the reasons for not issuing a complaint.

In addition to the range of functions which Congress has entrusted to the FLRA, the structure of the statutory scheme itself indicates that Congress intended no independent federal court jurisdiction over such matters. As explained in *National Federation of Federal Employees, Local 1263 v. Commandant, Defense Language Institute*, 493 F. Supp. 675, 679 (N.D. Cal. 1980), under the FLRA Congress explicitly empowers the federal courts to act in three instances:

> *First*, it makes judicial review of final orders of FLRA available only in the appropriate federal circuit courts of appeals. 5 U.S.C. § 7123(a). *Second*, it provides that the FLRA may petition a circuit

> court of appeals for enforcement of its orders and for appropriate temporary relief or restraining order. 5 U.S.C. § 7123(b). *Third*, pursuant to § 7123(d), the FLRA, upon issuing an unfair labor practice complaint, may petition a federal district court for temporary injunctive relief.

(emphasis added). The statutory scheme further indicates that Congress has provided an explicit, but circumscribed, role for the federal courts as outlined in 5 U.S.C. § 7123. Reading the FLRA as a whole shows that Congress intended that the statutory procedure be deemed exclusive. *Id. See also Columbia Power Trades Council v. U.S. Department of Energy*, 671 F.2d 325 (9th Cir. 1982).

In the case at bar, the plaintiff filed, on June 3, 1983, an unfair labor practice charge with the FLRA against AFGE alleging violations of 5 U.S.C. § 7116(b)(1) concerning the five-day suspension in that:

> On June 2, 1983, William Wood, on behalf of AFGE Local 1759, refused to proceed to arbitrate on my grievance because: (1) I am not a union member, (2) I could not give them a $1,000.00 cashier's check toward arbitration costs.

By letter dated August 4, 1983, the FLRA Regional Director indicated that the unfair labor practice charge had been investigated and considered and that it did not appear that further proceedings were warranted. The Regional Director's decision was appealed to the General Counsel. On August 31, 1983, the plaintiff filed a second unfair labor practice charge against AFGE. This charge again alleged violation of 5 U.S.C. § 7116(b)(1) on basically the same grounds as set forth in the first charge,

this time regarding a 10-day suspension action. During the pendency of an investigation of the second charge, the plaintiff instituted this lawsuit. On October 31, 1983, the Regional Director again issued a letter declining to issue a complaint explaining that there is no evidence, after an investigation, that the union action was discriminatory, arbitrary, in bad faith or based on any unlawful considerations. In that letter, the plaintiff was informed of his right to appeal the decision to the FLRA General Counsel by no later than November 30, 1983.

In response to the motion to dismiss, the plaintiff urges this Court to create an exception to the exclusive jurisdiction of the FLRA to permit him to sue the AFGE for breach of the duty of fair representation. The plaintiff points out that the Supreme Court in *Vaca v. Sipes*, 386 U.S. 171 (1967), recognized an exception to the preemption doctrine in the private sector under Labor Management Relations Act ["LMRA"], 29 U.S.C. § 151 *et seq.* The Supreme Court in *Vaca* based the exception on the fact that Congress expressly provided private suits for breach of the collective bargaining agreement in section 301 of the LMRA, 29 U.S.C. § 185. Congress patterned the FLRA in many respects after the NLRA. *New Jersey Air National Guard v. Federal Labor Relations Authority*, 677 F.2d 276 (3d Cir. 1982), *cert. denied*, 103 S.Ct. 343 (1982); *Columbia Power Trade v. U.S. Department of Energy, supra*, 671 F.2d at 326-627 [*sic*]. For example, the role of General Counsel of the FLRA is analogous to the role of the General Counsel of the NLRB, and the decision of the General Counsel under each statute whether or not to issue a complaint is unreviewable. *Turgeon v. Federal Labor Relations Authority*, 677 F.2d 937, 939 (D.C. 1982).

Congress, however, did not enact a provision in the FLRA that is analogous to section 301 of the NLRA. Rather, Congress vested the FLRA with jurisdiction over such disputes. 5 U.S.C. §§ 7118, 7119(b)(2)(C)(1), 7121(b)(3)(C), 7122(a). Section 301 of the NLRA confers jurisdiction of the district court over suits based upon collective bargaining agreements. However, section 301 of the NLRA does not confer jurisdiction in this case because section 301 is inapplicable when the federal government is sued. 29 U.S.C. § 152. In that Congress did not enact in the FLRA a provision analogous to section 301 of the LMRA and because Congress explicitly empowers the federal courts to act in three situations not applicable to this case, the Court declines to carve out an exception to the preemption doctrine as urged by the plaintiff. *See National Federation of Federal Employees, Local 1263 v. Commandant, Defense Language Institute, supra*, 493 F. Supp. at 681 n.13.

In conclusion, the Court GRANTS the defendant's motion to dismiss for lack of subject matter jurisdiction because Congress conferred exclusive jurisdiction over the instant complaint in the FLRA.

SO ORDERED, this 23 day of March, 1984.

/s/ Charles A. Moye, Jr.

UNITED STATES DISTRICT JUDGE

APPENDIX C

Pertinent Statutory Provisions of Title VII of the Civil Service Reform Act (Federal Service Labor-Management and Employee Relations Statute) and 28 U.S.C. § 1331, the general federal question jurisdiction statute

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28 U.S.C. § 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the constitution, laws, or treaties of the United States.

5 U.S.C. § 7101. Findings and purpose

(a) The Congress finds that—

(1) experience in both private and public employment indicates that the statutory protection of the right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them—

(A) safeguards the public interest,

(B) contributes to the effective conduct of public business, and

(C) facilitates and encourages the amicable settlements of disputes between employees and their employers involving conditions of employment; and

(2) the public interest demands the highest standards of employee performance and the continued development and implementation of modern and progressive work practices to facilitate and improve employee performance and the efficient accomplishment of the operations of the Government.

Therefore, labor organizations and collective bargaining in the civil service are in the public interest.

(b) It is the purpose of this chapter to prescribe certain rights and obligations of the employees of the Federal

Government and to establish procedures which are designed to meet the special requirements and needs of the Government. The provisions of this chapter should be interpreted in a manner consistent with the requirement of an effective and efficient Government.

5 U.S.C. § 7102. Employees' rights

Each employee shall have the right to form, join or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right. Except as otherwise provided under this chapter, such right includes the right—

(1) to act for a labor organization in the capacity of a representative and the right, in that capacity, to present the views of the labor organization to heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities, and

(2) to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under this chapter.

5 U.S.C. § 7111. Exclusive recognition of labor organizations

(a) An agency shall accord exclusive recognition to a labor organization if the organization has been selected as the representative, in a secret ballot election, by a majority of the employees in an appropriate unit who cast valid ballots in the election.

5 U.S.C. § 7114. Representation rights and duties

(a)(1) A labor organization which has been ac-

corded exclusive recognition is the exclusive representative of the employees in the unit it represents and is entitled to act for, and negotiate collective bargaining agreements covering, all employees in the unit. An exclusive representative is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership.

5 U.S.C. § 7116. Unfair labor practices

(b) For the purpose of this chapter, it shall be an unfair labor practice for a labor organization—

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter . . . .